

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2348-CR

Cir. Ct. No. 2012CF5512

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MAMADOU BAMBA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Judgment and order affirmed in part, reversed in part, and cause remanded with directions.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Mamadou Bamba appeals a judgment of conviction and an order denying his motion for resentencing. He challenges only his sentences. Because we conclude that the circuit court erroneously exercised its

sentencing discretion and that the circuit court sentenced Bamba on the basis of inaccurate information, we reverse in part and remand for resentencing before a different circuit court judge.

BACKGROUND

¶2 Bamba came to the United States in 2008 as an immigrant from Ivory Coast. He had no criminal record when, during approximately three hours in the evening of November 1, 2012, he committed the series of crimes underlying this appeal. All of the crimes involved Bamba, armed with a knife, approaching women and demanding money or a cell phone; one of the women sustained a knife wound in the encounter. Bamba was arrested the same night. He confessed, telling officers that he intended to resell the stolen cell phones because he needed money to pay his rent.

¶3 The State charged Bamba with six crimes. By the end of January 2013, he had resolved the charges with a plea bargain, pleading guilty to three counts of armed robbery and one count of robbery. The circuit court imposed three consecutive six-year sentences and a consecutive four-year sentence, each evenly divided between initial confinement and extended supervision.

¶4 The complaint describes an atypical and at times clumsy robber. One victim pleaded with Bamba to return her bus pass, and when he could not find it in the purse he was stealing from her, he threw down five dollars instead. During another robbery attempt, he evidently dropped the knife. After retrieving it, he cut the shoulder strap from the victim's purse, then fled without taking anything when a car alarm sounded. The police quickly apprehended him because he drove his own car away from the crime scenes, and a victim reported his license plate to law enforcement.

¶5 In anticipation of sentencing, Bamba filed a psychological report that advised the circuit court about trauma he had experienced as a victim of violence in Ivory Coast and the mental health consequences of that experience, including diagnoses of major depressive disorder and post-traumatic stress disorder. The presentence investigation included an assessment reflecting that, at age twenty-nine and with no criminal history, he was a low risk for both violent and general recidivism. During the sentencing hearing, Bamba, through his counsel, told the circuit court about the death of a family member at the hands of rebels in his war-torn country, described how he was kidnapped, beaten, and stabbed by one of the country's warring factions, and further described how he fled through the jungle, eventually escaping to the United States. Bamba went on to explain that he obtained a series of low-paying jobs, lived in his car for a time, then started a family before he and his fiancée were able to support a child. He told the circuit court about his increasing desperation flowing from his inability to obtain enough hours at his job to meet the needs of his fiancée and his young daughter, and his panic upon receiving an eviction notice.

¶6 The circuit court spoke at some length when determining sentences for Bamba. As relevant here, the remarks encompassed extended reflections on Bamba's origins in Ivory Coast and the effect the circuit court believed his origins had on him:

I don't care from the Ivory Coast or whatever, who ever gave you the right to be threatening a person's life or very existence because you want financial betterment for you and yours? It's not right. And just because that may be what they did back in Ivory Coast, that's not what we do here.... But to go out and do these things to these innocent people is completely unsatisfactory, won't be tolerated, can't be tolerated in a civilized nation which you live in now....

And understand your experiences of life back in the Ivory Coast, obviously that may certainly have – may certainly have given you some reason to think that, okay, if you want something you just go out and steal it or take it or intimidate others to get it, we operate under the rule of law. And as long as we can operate in such a fashion, this type of behavior will not be tolerated.

I can also tell you that just because that was what you experienced back in a different time and place, which obviously was not satisfactory to you, because you and your family got out of there – why? Because you disagreed with the life and the way they treated people. To then bring that experience to this country and say, Well, that’s what we had back in Ivory Coast and, therefore, that’s what I’ll do here because that’s what I learned to do back there, is completely bogus. Bogus from the standpoint that’s why you left there. You didn’t like the way they treated people, and well you shouldn’t have.

So you should have learned, if nothing else, from the negative experience you had over there that that’s no way to treat people over here. And if you didn’t, well, you should have.

¶7 Bamba filed a postconviction motion seeking resentencing. He argued that the circuit court made unsupported assumptions about how his Ivory Coast origins affected his character and that, by making such assumptions, the circuit court erroneously exercised its discretion and violated his due process right to be sentenced on the basis of accurate information. The circuit court denied resentencing in a written order entered without a hearing.¹ He appeals.

DISCUSSION

¶8 Sentencing lies within the circuit court’s discretion, and we adhere to a strong policy against interfering with the circuit court’s exercise of sentencing

¹ The circuit court granted Bamba’s request for relief from a deoxyribonucleic acid surcharge.

discretion. *State v. Gallion*, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197. The convicted offender must show some unreasonable or unjustifiable basis in the record for the sentences imposed before we will conclude that the circuit court erroneously exercised its discretion. See *Ocanas v. State*, 70 Wis. 2d 179, 183-84, 233 N.W.2d 457 (1975). Our deference stems from our recognition that the circuit court is in the best position to observe the demeanor of the defendant and weigh the relevant factors. See *Gallion*, 270 Wis. 2d 535, ¶18. We do, however, require the circuit court to provide a “rational and explainable” basis for a sentence and to apply “the primary sentencing factors to the particular facts of the case.” *Gallion*, 270 Wis. 2d 535, ¶¶39, 58. “The primary sentencing factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76.

¶9 In this case, Bamba concedes that the circuit court appropriately considered the gravity of the offenses and the need to protect the public. He challenges the circuit court’s assessment of his character. He asserts that the record contains a substantial amount of information from which the circuit court could measure his character, but instead, the circuit court drew unwarranted inferences and reached unjustified conclusions about him based on his origins in Ivory Coast. We must agree. The record does not show, and does not permit a reasonable inference, that Bamba lives by a code of conduct learned in Ivory Coast or that he took the actions that he did on November 1, 2012, “because that’s what we did back in Ivory Coast.” These conclusions are not “rational and explainable.” Cf. *Gallion*, 270 Wis. 2d 535, ¶39 (citation omitted). The record includes nothing to show that Bamba had a criminal history in Ivory Coast, nor

does the record support the circuit court's implied conclusion that Bamba brought to the United States a predatory mindset developed in his homeland.

¶10 A circuit court has an opportunity to further clarify its sentencing decisions when they are challenged by postconviction motion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). In the postconviction order here, the circuit court said that it did not “necessarily believe that the defendant learned his behaviors in this case from his experiences in Ivory Coast,” and the circuit court went on to say that the point of the sentencing remarks was that Bamba should have appreciated the seriousness of violence and its deleterious effects because he had been victimized himself. Like Bamba, however, we are compelled to conclude that the postconviction explanation does not fully account for the remarks made at sentencing. Those remarks reflect that the circuit court believed it understood Bamba's character based on unsupported assumptions about the effect of growing up in Ivory Coast. Accordingly, we cannot view the circuit court's postconviction assessment of the sentencing remarks as dispositive. *Cf. State v. Travis*, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491 (sentencing court's “after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance”).

¶11 Nonetheless, the State suggests that the circuit court drew an inference that “is independently reasonable—that being regularly exposed to violence and anarchy could contribute to skewed conceptions of the value of human life and property.” The supreme court has reminded us, however, “to be cautious when reaching high consequence conclusions about human nature that seem to be intuitively correct at the moment. Better instead is a conclusion that is based on more complete and accurate information and reached by an organized framework for the exercise of discretion.” *Gallion*, 270 Wis. 2d 535, ¶36.

¶12 The circuit court could have analyzed Bamba’s character by using the measures discussed in the presentence investigation report, by examining the psychological assessment Bamba filed, or by considering the other information presented at sentencing. The circuit court, however, relied on unsupported inferences drawn from what it believed his homeland revealed about him. Although we are confident that the circuit court’s remarks were not motivated by malice, they appear to reflect conclusions based on a preconceived stereotype rather than on the materials about Bamba in the record. We must conclude that the sentences rest on an unreasonable and unjustifiable basis.²

¶13 Additionally, “[a] defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis.2d 179, 717 N.W.2d 1. A defendant claiming a violation of this right must show that the disputed information was inaccurate, and that the circuit court actually relied on the inaccurate information. *See id.*, ¶2. A circuit court relies on inaccurate information by giving “‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *Id.* at ¶14 (citation omitted).

¶14 The sentencing remarks, Bamba argues, show that the circuit court fashioned his sentences in light of an erroneous conclusion, specifically, that he “brought to this country a philosophical belief that it was acceptable to prey upon people because that was the way of things in his homeland.” In postconviction proceedings, the circuit court determined that this aspect of Bamba’s claim is not

² For the sake of completeness, we clarify that Bamba disavows any claim that the circuit court violated his right to due process by sentencing him based on his nationality, and we have not considered such a claim.

that the circuit court relied upon inaccurate information but that the circuit court relied upon an “unsupported assumption.” A circuit court’s erroneous assumption, however, may not form the basis for a sentence. *See id.* at ¶¶6, 31 (sentencing judge’s erroneous belief that defendant had twenty prior convictions warranted resentencing where information presented at original sentencing showed defendant had five prior convictions). *Tiepelman* holds that a defendant is entitled to resentencing when the circuit court relies on erroneous information and reflects that the rule is no less applicable when the erroneous information is the product of the circuit court’s misunderstanding of accurate information presented. *See id.*

¶15 In this case, the circuit court’s sentencing remarks reflect that the sentences imposed are based on an unsupported and therefore erroneous finding, namely, that Bamba believed he was entitled to commit crimes in the United States because he learned in Ivory Coast that criminal behavior is acceptable. We conclude that Bamba is therefore entitled to resentencing by a different judge.

By the Court.—Judgment and order affirmed in part, reversed in part, and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

